Petition

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In the

Supreme Court of the United States

OCTOBER TERM, 1981

No.

VINCENT PACELLI, JR.,
Petitioner

v

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STEVEN B. DUKE
Hastings College of Law
198 McAllister Street
San Francisco, California 94102
(415) 557-0448

Counsel for Petitioner

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The petitioner, Vincent Pacelli, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 14, 1981.

QUESTIONS PRESENTED

1. Whether a prisoner who proves that an Assistant United States Attorney knowingly relied on the perjury of his witness and on his own willful suppression of specifically requested impeachment material may be denied a hearing on his motion under 28 U.S.C. §2255 if the court has not been persuaded that there is a reasonable doubt of his guilt, or whether the proper test of materiality in such cases is whether there is any reasonable likelihood that the perjury and the suppressed evidence could have affected the verdict of the jury.

2. Whether a United States District Judge, who has been shown by record evidence to have known during the trial that the Government's witness was committing perjury and that the Government was suppressing specifically requested exculpatory evidence, and to have known that Governmental representations made to him during the trial were false, but who nonetheless permitted the Government to convict the accused, and himself sentenced the accused without disclosing any of the perjury, suppression or fraud, is disqualified from sitting on the prisoner's §2255 petition which asserts that said judge's acquiescence in the prosecutorial misconduct, and his own nonfeasance, was itself a violation of Due Process?

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OPINION BELOW

The opinion of the Court of Appeals is unreported. It appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 14, 1981. Jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTE INVOLVED

28 United States Code Section 455:

§455. *Disqualification of justice, judge or magistrate*

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them or the spouse of such a person;

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

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STATEMENT OF THE CASE

In February, 1972, petitioner was tried with his wife and Demetrios Papadakos for conspiring together and with Elisa Possas to distribute heroin and cocaine (count 1). Petitioner was also charged with distributing with Possas, 110 grams of cocaine on May 3, 1971 (count 2), distributing, with Papadakos and Possas, 473 grams of heroin from May 10-20, 1971 (count 3), possessing, with his wife, about 11 grams of cocaine on May 21, 1971 (count 4) and using, with Possas, a telephone in a drug transaction (count 5). Petitioner's wife was acquitted by the court on both counts. Petitioner was acquitted by the

jury on count 2, convicted on counts 1, 3, 4 and 5. He received a total sentence of twenty years and a $10,000 fine.

The only direct evidence against petitioner was testimony of narcotics agents that when they went to his apartment to arrest him on May 21, 1971, they heard a window open and then a toilet flush, and later found about 11 grams (1/3 ounce) of cocaine outside his apartment building, which petitioner admitted had been his. A search of the apartment revealed no narcotics or paraphernalia.[1]

Apart from that evidence — which consisted of nothing more than proof that petitioner possessed a quantity of cocaine consistent with personal use, *United States v. Swiderski,* 548 F. 2d 445 (2d Cir. 1977) — the only evidence against petitioner was contradictory hearsay. BNDD Agent LaPore testified that he bought cocaine and heroin, in an undercover capacity, from Elisa Possas. She had told him initially that the sole source for her drugs was "Lorenzo" (2-369)*. Later, she told him that her source for the heroin was her boyfriend, codefendant Papadakos. (2-373). Finally, she allegedly told Lepore that petitioner was her sole source for both heroin and cocaine (2-380). At another point, according to LePore, he had Possas

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[1] Although agents seized such things as petitioner's barbells, they neither seized nor photographed the one item they later claimed was drug related. At trial, they claimed to have seen a large quantity of boric acid in the apartment and that boric acid is a common diluent for drugs (Tr. 448, 450, 524-28). The testimony about finding the boric acid was suspect, the testimony about it being a drug diluent was false. Boric acid is far too toxic for such purposes, as petitioner established in his brief on the direct appeal. Appellant's brief, Dkt. No. 72-1709, p. 30.

*Reference is to Volume 2, page 369, of the appendix below.

telephone petitioner and tell him "my man will take the half" (2-379). This was the basis for count 5 of the indictment.

Two drug dealing witnesses were called by the Government. The first, Lorenzo Cancio, testified that he had sold 1/2 kilo of cocaine to Papadakos and Possas on May 5 (2-395). He also said that he had sold cocaine to them on three other occasions (Tr.167). He said nothing about petitioner. On direct examination, he stated that he had pled guilty to three separate drug charges and was awaiting sentence thereon (2-394). Nothing was said about a pending fourth charge, involving heroin.

On cross-examination, Cancio swore, repeatedly, that he had never had any drug transactions with anyone prior to 1971, that he had never dealt in any drug but cocaine, that his first drug transaction in his life was with Papadakos in 1971; that the total quantity of drugs he had sold in his life was "about five kilos" (2-410-423).

Cancio also swore that between May, 1971, and October, 1971 he had sold no drugs, other than the cocaine he had sold when he was rearrested in October (2-424).

Cancio also testified that although he had cooperated with the Government following his first arrest in May, 1971 and again following his second arrest in October, 1971, he had never talked with the agents about receiving anything for his cooperation (2-427) and they never promised him anything (2-428).

The Government's other principal witness was Elisa Possas who, like Cancio, had pled guilty prior to the trial. Possas, however, testified that she had never met and did not know petitioner, had no drug transactions whatever with him (2-465, 467, 468). The sole source for the heroin and cocaine that she

admitted selling to agent LePore, she swore, was Lorenzo Cancio (2-452, 466, 476). Her testimony thus tracked what she had originally told agent LePore about her source.

The prosecutor, Assistant United States Attorney John Walker, Jr., claiming surprise but armed with a lengthy memorandum in support, was permitted to "impeach" Possas by introduction of a written statement, signed by Possas following her arrest, which asserted that petitioner was the sole source for both the heroin and cocaine (GX 9A, 1-279). Petitioner's counsel sought a hearing to disprove the Government's claim of surprise, but the trial judge denied it (2-479, 495).

On appeal, the United States Court of Appeals for the Second Circuit held that it had been error to admit the written statement as substantive evidence of the truth of its contents but that the error was harmless in view of the fact, *inter alia,* that the statement was admissible to "cancel out the *unexpected* contradictory testimony made on the stand." *United States v. Pacelli,* 470 F. 2d 67, 70 (2d Cir. 1972), cert. den. 410 U.S. 983 (1973) (emph. supp.)

A. Petitioner's Motion to Vacate

Relying on various court records, BNDD agent's reports, and the testimony of Lorenzo Cancio in a 1974 trial, together with statements and disclosures made by the Government in that case, petitioner asserted that his conviction was obtained by the knowing use of perjury, the deliberate and gross suppression of evidence, and a false claim of surprise that permitted the Government to inject known false hearsay evidence into the trial under the guise of impeaching its own witness. Petitioner also alleged that the trial judge, Hon. Milton Pollack, had been a knowing participant in these fraudulent, criminal

practices, and urged his disqualification (1-183).

The evidence in support of the petition to vacate was, briefly, as follows:

I. PERJURY

Perjury concerning Cancio's drug activities

1. Cancio's testimony in *Torres*

Called as a witness by the Government in a 1974 prosecution, *United States v. Torres,* Cancio testified that in the summer of 1971, he worked as an undercover agent for the Government, made a trip to Los Angeles with Government agents in an effort to intercept a large shipment of heroin and cocaine (2-599-605). He was paid for his efforts (2-553). Instead of intercepting the shipment, however, Cancio received, in August 1971, some twenty-five kilos of heroin and four and half kilos of cocaine, all of which he promptly sold for several hundred thousand dollars (2-605A-616). Indeed, Cancio testified that he had been in the heroin and cocaine business for most of the period, since 1961, that he had been in this country (2-628, 633, 647, 649).

Cancio admitted that his testimony in petitioner's trial had been "blatant perjury" and had been known to be such by Judge Pollack (2-684-686).

2. Cancio's grand jury testimony

On October 7, 1971, four months before petitioner's trial, Cancio testified before a federal grand jury sitting in the Southern District of New York (1-157). There, he related his narcotics activities with the *Torres* group, which began in late 1970 and continued into the fall of 1971. He told of receiving five kilos of cocaine from the group in May 1971, and selling one-half kilo to Possas (1-160). He related his trip with BNDD

agents to Los Angeles in July, 1971, and his subsequent receipt from the *Torres* group, in New York, in August, 1971, of *ten kilos of heroin,* which he promptly sold (1-165G-H).

3. BNDD agents' reports

Petitioner also submitted in support of the motion, previously suppressed reports of BNDD agents, which had antedated petitioner's trial, and which recounted Cancio's activities as an undercover agent and his sales of huge quantities of cocaine and heroin during the summer of 1971 (1-168-178).

Perjury concerning Cancio's receipt and promises of consideration from the Government

Cancio admitted in his *Torres* testimony that he had been promised immunity from prosecution for all crimes concerning which he provided information to the Government, including, *inter alia,* his role in a gigantic heroin-cocaine smuggling conspiracy, one involving importation and sale of some 144 kilos of heroin and cocaine (2-663, 639, 666). The attorney for the Government in that case also admitted that Cancio had an immunity agreement with the Government; that he would not be prosecuted for any of his criminal activities other than the three charges involving cocaine to which he had already pled guilty and (in April, 1972) had been sentenced (2-553-554). Cancio stated that his deal had been made with the agents in May, 1971 — more than six months before petitioner's trial (2-645). Disclosures of payments made by the Government to Cancio for his activities in the summer of 1971 were also disclosed in the *Torres* trial (2-553).

Perjury concerning Cancio's pending charges

Cancio testified on direct in petitioner's trial, at the behest of AUSA John Walker, Jr., that he had pled guilty and was

awaiting sentence on *three charges* involving cocaine (2-393-94). On cross-examination, he was asked what drugs the three charges involved. He replied that all three involved cocaine only (2-409). He denied that he had any other cases pending in any court (2-409).

The truth was that there was a fourth charge then pending, in the very same court, indictment 71 Cr. 1159 (1-44D), which has been returned on October 8, 1971, and which charged Cancio with conspiracy to distribute both cocaine and heroin. This charge, about which Cancio himself had testified before the grand jury (1-157), involved Cancio in an international smuggling conspiracy which imported and distributed some 144 kilos of heroin and cocaine, at least twenty-nine kilos of which Cancio himself sold in the course of a few days in August, 1971, at a time when Cancio swore he *sold no drugs.*

The prosecutor's knowledge of and reliance upon the perjury

John Walker, Jr., an Assistant United States Attorney who prosecuted petitioner, had also been the principal prosecutor of Cancio, appearing for the Government at Cancio's bail hearing in October, 1971 (1-45), and at Cancio's sentencing in April, 1972 (1-70). Walker also represented the Government in a drug prosecution against Cancio's girlfriend in January, 1972, shortly before petitioner's trial. Cancio had testified as a defense witness and Walker had cross-examined him. Walker had also been the principal prosecutor, before the grand jury, of the huge heroin smuggling conspiracy which eventually came to trial, as the *Torres* case in 1974 (1-44A). Walker had interviewed Cancio beforehand and actually *elicited* Cancio's October, 1971 grand jury testimony (1-165) and drafted the indictment in that case. In that grand jury testimony (not disclosed to petitioner until 1980!) Cancio told, *inter alia,* of his receipt and resale of ten

kilos of *heroin* in the summer of 1971! (1-165).

In their summations to the jury, counsel for petitioner and codefendant Papadakos argued vociferously and at length that Possas' testimony had been truthful — Cancio had been her sole source for the heroin and cocaine she sold to the agent — and that Cancio's testimony, that he had never dealt in heroin and, only briefly and limitedly, in cocaine, was perjurious; that he was lying to minimize his involvement in drug trafficking (2-513-14, 516-17, 530-33). Prosecutor Walker, on the other hand, argued that Possas was lying and Cancio was telling the truth: ". . . She says here that Lorenzo Cancio was her only source of narcotics, . . . [but] Lorenzo Cancio *testified that he dealt in cocaine and not in heroin* (emph. supp.). That is over and above everything else but that Lorenzo Cancio was her only source for narcotics is absurd . . ." (2-546).

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"The Government is relying on the testimony of Lorenzo Cancio . . . " (Tr. 631).

Judge Pollack's knowledge of the perjury

Cancio testified in *Torres* that he had committed "blatant perjury" in petitioner's trial and that Judge Pollack knew it (2-684-686). When Judge Pollack sentenced Cancio, in April, 1972, he stated his belief that Cancio had committed "blatant

perjury" (1-176).[8] Moreover, independent evidence shows that Judge Pollack had known, at the time of petitioner's February, 1972 trial, of Cancio's involvement in heroin trafficking. Indictment 71 Cr. 1159, returned on October 8, 1971, was assigned to Judge Pollack on that date (1-44A). That indictment accused Cancio of conspiracy to distribute heroin, *i.e.* a "Schedule 1" drug (1-440). During Cancio's plea proceedings, three months before petitioner's trial, Judge Pollack indicated that he was aware of the outstanding indictment and stated that it involved "Schedule I and II narcotics substances" (1-68). Judge Pollack also indicated that he expected that indictment to be dismissed against Cancio after he was sentenced on the cocaine charges (1-68). Judge Pollack also ordered a presentence report on Cancio prepared on November 15,1971 and set sentencing for December 16, 1971 (1-65). When Cancio was sentenced, after petitioner's trial, his attorney stated, without contradiction or dissent, that Judge Pollack had been made aware "at the time Mr. Cancio pled guilty" of the fact that Cancio had gone before a grand jury and helped to produce an indictment of several defendants "engaged in

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[8] Judge Pollack 's remarks at Cancio's sentencing may have referred to Cancio's testimony on behalf of his girlfriend, rather than his testimony in petitioner's trial. However, Cancio clearly testified that his perjury was in petitioner's trial, not his girlfriend's, and that Judge Pollack knew it (1-684-686). Moreover, even if Judge Pollack was referring only to his opinion, as to which he had "not the slightest doubt" that Cancio perjured himself in the girlfriend's case, Judge Pollack still permitted Cancio to lie in petitioner's trial on that very point, for defense counsel asked Cancio about the other testimony in petitioner's trial, and Cancio swore he had told the truth there (2-430). The Government and Judge Pollack permitted this denial to go uncorrected.

narcotics traffic on a large international scale" (1-72). Those remarks could only have related to the *Torres* indictment, that being the only indictment concerning which Cancio had given grand jury testimony.[8] Judge Pollack also characterized Cancio as a "major supplier of narcotics" (1-76), a remark that would not even have been suggested by Cancio's testimony at petitioner's trial.

II. SUPPRESSION OF MATERIAL EVIDENCE

Prior to trial, petitioner's counsel requested a copy of Cancio's criminal record (1-319), copies of outstanding indictments against him (1-319), statements of consideration promised or shown or immunity granted any of the government's prospective witnesses (1-321), together with several general *Brady v. Maryland,* 373 U.S. 83 (1963), requests. By affidavit, Mr. Walker consented to each of these requests (1-326) and was subsequently ordered by the court to comply with them (1-323). In proceedings which occurred the day before trial, Mr. Walker claimed to have turned over all such material, including relevant material producible under 18 U.S.C. §3500, insofar as such material existed (2-332, 360). Defense counsel pressed, however, claiming that there were items of §3500 material not turned over which would be producible under *Brady* (2-347-349). The court ordered Mr. Walker to reexamine the undisclosed material in light of *Brady* and the defense's claims (2-350).

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[8] Prosecutor Walker also spoke for the record about Cancio's investigative role in the *Torres* matter and his testimony before the grand jury which "resulted in the indictment for a narcotics conspiracy of several what are believed to be high level narcotics traffickers" (1-75).

The only thing that was ever turned over concerning Cancio was his three cocaine indictments and a misleading and incomplete rap sheet (1-14, 37-39, 307) — it made no reference to the pending heroin charges, *i.e.* to the fourth indictment outstanding against Cancio (1-166). Nor was anything ever disclosed about Cancio's immunity agreement, his relationship as an undercover agent, his sales of large quantities of heroin and cocaine in the summer of 1971, his October, 1971 grand jury testimony; not even his plea minutes were produced! (1-14, 37-39, 306-307).

That the prosecutor, Mr. Walker, was fully aware of all these other items — the BNDD reports, the grand jury testimony, the immunity agreement, the other crimes for which Cancio had received immunity — cannot be doubted and was not disputed below.[4] Walker had to have seen the BNDD reports, since he not only prepared and presented the *Torres* case to the grand jury and was assigned to that indictment (1-44A), he had earlier cross-examined Cancio in a January, 1972 drug prosecution, and had appeared in various proceedings involving Cancio.

Judge Pollack also knew, at least during the trial, when Cancio repeatedly committed perjury, that the defense had not been give such materials, which Judge Pollack knew existed, as indicated *supra.*

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[4] No affidavit was submitted by Mr. Walker below. Moreover, although the Assistant United States Attorney opposing petitioner's motion interviewed all defense counsel and misquoted them about what they had said, there was no reference to an interview of Mr. Walker, although he now practices in Manhattan. Petitioner's counsel repeatedly demanded to hear from Mr. Walker, to no avail. See *e.g.* Appellant's brief below, pp. 43, 56; Tr. Nov. 14, 1980.

III. FRAUDULENT REPRESENTATIONS CONCERNING POSSAS

The Government obtained admission of Gov. Ex. 9A, as an alleged written statement of Possas, in which she allegedly asserted that petitioner was "Papadakos' connection for all the heroin and cocaine that Jimmy supplied to his customers" (1-279), by Mr. Walker's falsely asserting, "I was completely surprised" (2-495) by Possas' testimony, in which she denied knowing petitioner and swore that Cancio was her sole source of drugs. Since the Court of Appeals subsequently held that the statement was admissible for the limited purpose of impeachment only if the Government was surprised, 410 F. 2d at 70, this fraud was crucial to petitioner's conviction.

Both the prosecutor and the trial judge knew that the claim of surprise was a fabrication. When Possas had first pled guilty, with Mr. Walker as prosecutor and Judge Pollack as judge, she said she didn't know the names of the people who gave her the drugs she sold (1-103). Later, when she pled guilty to another indictment, in August, 1971, and was sentenced, she told the court "nobody else involved with me besides my connection" (1-134). Judge Pollack stated that "from the reports I have here there seems to be a studied desire on her part not to discuss her involvement in the instant offense" (1-146). Her attorney then stated that she would be willing to disclose "one individual . . . her connection" (1-147). Posses never testified before a federal grand jury. It is thus clear that Possas' testimony on the stand was precisely what the Government had reason to believe it would be — that Cancio was her "connection" and that petitioner and Papadakos had nothing to do with her drug business. More-

over, defense counsel in petitioner's trial had represented, in an effort to obtain a hearing on the issue of surprise, that Mr. Walker had interviewed Possas prior to trial, as had BNDD agents, and "she told [them] essentially what she testified to on the stand . . ." (2-494). The claim of surprise was a fraud, known to be such by the trial judge.

B. *The Motion to Disqualify*

Petitioner urged, by timely affidavit (1-183), that Judge Pollack was disqualified to sit on the §2255 motion because he was a material witness to the Government's fraud and knowing reliance upon perjury, *i.e.* he had unique knowledge of what the Government had done; that, indeed, there were obviously communications between the judge and others, not including petitioner or his counsel, that would help to prove the Government's perfidy. Petitioner also moved to disqualify Judge Pollack on the separate ground that he had an interest in the outcome: the allegations, if true, would at the very least show that he was willing to see petitioner and his co-defendant convicted with perjury, suppressed evidence, and fabricated claims; at worst, they would show that the judge was a knowing participant in a conspiracy to obstruct justice. Proof of petitioner's claims would not only be damaging to the judge's reputation, they could produce censure, disbarment, even removal from the bench. For Judge Pollack to sit would be tantamount to judging one's own case.

C. *Rulings Below*

Judge Pollack refused to disqualify himself on the ground that since the alleged bias arose in the course of judicial proceedings, it was immune from challenge (Addendum to Government's Brief below). He then denied a hearing, on

various grounds (1-245). The Court of Appeals (Kaufman, Oakes, and Werker, DJ) affirmed. It refused to disqualify Judge Pollack on the ground that the bias did not arise from an extra-judicial source (App. p. 2). The Court then went on to hold that Cancio's testimony was "not part of the Government's case against the appellant . . . Accordingly [petitioner is entitled to relief] only if exposure of the perjury would create a reasonable doubt that would not otherwise exist." With respect to the suppressed evidence, the Court characterized petitioner's request as "only a general request," and, accordingly, that the appropriate test of materiality was whether a reasonable doubt was created. The court thought there was none (App. pp. 2-3).

The Court added a remark that petitioner's delay in bringing the motion to vacate was "both unexplained and prejudicial to the Government." (App. p. 3). In truth, however, neither was the case.*

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*Petitioner established, without contradiction, that the *Torres* transcript and the BNDD reports were only recently within his possession or knowledge, and that the October, 1971 grand jury testimony was not disclosed to him until after the petition was filed. Petitioner's trial counsel swore that he was unaware of and had not seen any of these matters, or Cancio's heroin indictment, *prior to November, 1980* (1-307-308). Moreover,as petitioner pointed out (reply brief below, pp. 15-16), the only kind of prejudice that may be considered against a petitioner in a §2255 proceeding is prejudice in meeting the allegations. There was no reason to suspect, and certainly no showing, that Mr. Walker would have difficulty responding to the claims if they were false.

REASONS FOR GRANTING THE WRIT

QUESTION 1

1. *The decision of the court below is plainly wrong and is a deliberate distortion of this Court's decision in United States v. Agurs,* 427 U.S. 97 (1976).

It has been clear for nearly half a century that a conviction obtained by the knowing use of perjury is a nullity. *Mooney v. Holohan,* 294 U.S. 103, 112 (1935); *Pyle v. Kansas,* 317 U.S. 213 (1924). This is no less true when the perjury relates solely to the credibility of the prosecution's witness than where it relates to the facts of the offense. *Napue v. Illinois,* 360 U.S. 264 (1959); *Giglio v. United States,* 405 U.S. 150 (1972). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears," *Napue v. Illinois, supra,* 360 U.S. at 269, and whether the false testimony is elicited by the prosecution or the defense, *Giglio v. United States, supra.*

Similarly, when the prosecution knowingly fails to divulge material evidence, of an impeaching character or otherwise, which has been specifically requested by the defense, the conviction is void if the suppressed evidence might have effected the outcome of the trial favorably to the defendant. *United States v. Agurs,* 427 U.S. 97, 106 (1976). See also, *Brady v. Maryland,* 373 U.S. 83 (1963).

Petitioner conclusively proved that the Government's witness committed repeated, flagrant perjury. Indeed, page after page

of his testimony was prejurious.[6] Petitioner also proved conclusively that the very prosecutor who tried the case was fully aware of the falseness of the testimony, yet relied upon it in summation.

Contrary to the opinion of the court below, moreover, this was not a case where suppressed evidence was merely the subject of a "general request." Petitioner's requests for Cancio's pending charges, his immunity agreement, his prior statements concerning his participation in narcotics trafficking, consideration paid or promised to him, could hardly have been more specific.[7] There could have been no doubt in any prosecutor's mind that the undisclosed fourth indictment, the immunity agreement, the October grand jury testimony, and the BNDD reports of Cancio's sales of cocaine (to Possas) and heroin (to others) was the subject of petitioner's discovery requests

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[6] Cancio's direct testimony about *three* pending charges (1-393-394) was at least grossly deceptive, and virtually his entire cross-examination testimony, *i.e.* 2-409-430, was perjurious. Notably, this steady stream of perjury was interrupted by a luncheon recess (2-418), then continued unabated.

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[7] This Court, in *United States v. Agurs*, 427 U.S. 97, 106-107 (1976), defined a general request as one such as "all *Brady* material" or "anything exculpatory" which "gives the prosecutor no better notice than if no request had been made." Petitioner's requests, in contrast, were not only specific, making quite clear what was requested, petitioner even provided, in his request for witness's criminal records, citation of a case, *United States v. Bonnano*, 430 F. 2d 1060 (2d Cir. 1970), which required such material to be produced (1-319). It is noteworthy, moreover, that the Government *purported* to comply with this request by producing an erroneous rap sheet (1-166, 2-404).

and the trial court's orders to produce. Nor, even in the absence of a request, could the prosecutor have had any doubts of the materiality of this evidence. It would not only have proved Cancio's perjury, and his intimate relationship to and obligation to the Government, it would have corroborated Possas' testimony that Cancio was her sole drug source, for it would have shown, contrary to Cancio's testimony, that Cancio had ready sources, during the relevant period, of both heroin and cocaine, and that he was a frequent, steady dealer in such contraband.

To hold, as did the court below, that the prosecutor may knowingly fail to disclose that his witness is committing perjury and at the same time knowingly suppress exculpatory evidence, provided he can satisfy an appellate court on some later occasion that the defendant is nonetheless probably guilty, is an invitation to prosecutors to engage in the very criminal conduct engaged in to convict petitioner. Virtually every court, these days, presumes that everyone accused of dealing in drugs is guilty. The burden is in fact on the defendant, once convicted, to prove otherwise. And those he must convince are not jurors — who still have a healthy skepticism of the Government and particularly of narcotics agents — but hardened judges, who have heard claims of innocence *ad nauseum.*

In *United States v. Agurs, supra,* this Court made clear that when the prosecution fails to correct testimony which it knows or "should know" is false, or when it fails to produce specifically requested *Brady* materials, a "strict standard of materiality" applies, "not just because [such conduct] involve[s] prosecutorial misconduct, but more importantly because [it] involve[s] a corruption of the truthseeking function of the trial process." 427 U.S. at 104. The conviction is void if there is "any reasonable likelihood" that the perjury or the suppressed

evidence (or, here, both) "could have affected the judgment of the jury." *Id.* at 103.

Had this standard been applied in the instant case, there is no doubt of the result. As noted, the only direct evidence against petitioner was his possession of 1/3 of an ounce of cocaine — hardly enough even to prove distributive intent. There was no other such evidence of his involvement in drugs of any kind. Moreover, if Possas had been believed, or her testimony had even induced a reasonable doubt in the jury's mind, petitioner would have been acquitted on all counts. Even with Cancio's uncorrected perjury and the prosecutor's reliance upon it, petitioner was acquitted of the count accusing him of providing the 110 grams of cocaine for agent LePore (count 2).

The Court of Appeals' characterization of Cancio as "not part of the Government's case against appellant" (App. p. 1) is absurd. It is true that Cancio did not mention the petitioner. He did not know him and had never heard of him. But Cancio did squarely refute Possas' testimony which exonerated petitioner. Cancio denied that he could have been Possas' source for the heroin and part of the cocaine that she had sold the agent, thus supporting the Government's claim that Possas was lying. If she didn't get it from Cancio, where did she get it? The prosecutor virtually made the argument (2-543-546). Cancio's testimony was put to the same use by the prosecutor that it would have been put to had the defense called Possas and the prosecutor called Cancio in rebuttal. Cancio contradicted Possas. To say that he was "not part of the Government's case against" petitioner defies common sense and ignores the prosecutor's summation.

All of this should make no difference under a half century of this Courts decisions, however, for this Court has never made the test of materiality turn on who elicits the testimony or what the prosecutor's purpose was in letting perjury go uncorrected. Yet this Court did say, in *Agurs,* that if "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony . . ." 427 U.S. at 103. In context, of course, this Court did not mean to make the test of materiality rest on technical and essentially insoluble questions about whose case the perjury appeared in. Rather, the most reasonable reference of that dictum was to perjury obtained from Government witnesses, useful to the Government in obtaining a conviction, and used by it to obtain a conviction. The perjury in petitioner's case obviously came within that meaning of the phrase. As the Second Circuit has misconstrued *Agurs,* however, the test this Court developed for cases in which there was no defense request for exculpatory evidence — whether the undisclosed evidence would have produced a reasonable doubt — has virtually swallowed up the "strict standard of materiality," 427 U.S. at 104, applicable to perjury and suppression of requested evidence. So long as the perjury occurs on cross-examination of Government witnesses, or even, apparently, on direct if the prosecutor's purpose in calling the witness was primarily to convict a defendant other than the one who subsequently complains; or so long as the suppressed evidence relates to credibility only, it is arguably "not part of the Government's case against appellant" and he must prove his probable innocence in order to get relief. This gross misinterpretation of *Agurs* seems to be getting a firm foothold in the Second Circuit. See *United States v. Menghi,* 641 F. 2d 72, 74 (2d Cir. 1981).

Even if such distortions of *Agurs* were not a flat rejection of several prior decisions of this Court and all the other Circuits, it would still make no sense. Such a distinction has no connection to any of the considerations discussed by this Court in *Agurs*. What happened to petitioner in this case is a clear case of "corruption of the truth-seeking function of the trial process" as has ever appeared in the United States Courts.

When a prosecution witness, with the prosecutor's knowledge, perjures himself, or when the prosecutor knowingly withholds specifically requested and obviously important impeachment material, the prosecution has violated the Due Process Clause. *See Mooney v. Holohan, supra; Brady v. Maryland, supra.* A conviction in such a case should be set aside unless the prosecution can bear the burden of proving the perjury and suppression was harmless. *Cf. United States v. Agurs*, 427 U.S. at 111-112.

2. *The decision below is in conflict with all other Circuits*

The ruling below, following the lead of *United States v. Menghi*, 641 F. 2d 72 (2 Cir. 1981), seems to put the Second Circuit at odds with all others, in holding that the *Agurs* "reasonable doubt" test applies not only to the failure to disclose evidence which was not specifically requested but to perjury and specifically requested evidence as well. See *e.g., United States v. Iverson*, 637 F. 2d 799 (D.C. Cir. 1980); *United States v. Barham*, 595 F. 2d 231 (5th Cir. 1979).

3. *The decision below presents an important and fundamental issue in the administration of criminal justice — when can the prosecution be permitted to rely on evidence which it knows to be perjurious in its efforts to deprive an individual of his liberty and brand him as a criminal?*

This Court has never upheld a conviction of crime where the prosecution has knowingly relied upon perjury. Neither, insofar as petitioner has been able to determine, have any of the Circuit Courts. This is seemingly the first modern reported decision in which that has been done. The implications are ominous and this Court ought to decide whether it should permit the federal courts to be corrupted in such a manner. How can anyone have faith in a system which condones perjury by prosecution witnesses? That is the system implicit in the decision below.

QUESTION 2

The decision below renders meaningless this Court's repeated decisions that Due Process forbids adjudication by one who has an interest in the outcome. It also nullifies the provisions of 28 *U.S.C.* §455, *as amended in* 1974, *which require disqualification of the judge whenever he has "personal knowledge of disputed evidentiary facts," or has been a "material witness," or has any "interest that could be substantially affected by the outcome," or his "impartiality might reasonably be questioned."*

As the Court below construed the principal disqualification statute, 28 U.S.C. §455, it is virtually impossible to disqualify a district judge unless he has a financial interest in a party (or appeared as counsel in the controversy). If the allegations are of crimes on his part; if the petitioner's claims, if substantiated in a hearing, would warrant the judge's disbarment and even impeachment, he cannot be disqualified, because his bias, *i.e.* his interest in the outcome, did not arise "from an extrajudicial source" (App. p. 2). Thus construed, the disqualification statute applies almost solely to corporate litigation. The rich, *i.e.*, those interested in corporate litigation, are entitled to an unbiased

judge; those accused or convicted of crime are not, unless it is corporate crime.

As the Court below has construed the disqualification statute, a judge could be accused in a §2255 motion of taking a bribe to make sure a defendant is convicted or gets a high sentence. The claims could be conclusively proved, as the claims were in this case, yet disqualification would not be required because the bribe was received by the judge *qua* judge, and therefore lacked an "extrajudicial source."

Reversal of the decision below will not invite every defendant who thinks he was convicted or sentenced unfairly to seek disqualification of the judge in his §2255 petition (although there is much to be said for that position, see *Halliday v. United States,* 380 F. 2d 270 (1st Cir. 1967)). Petitioner here alleged not merely an unfair bent of mind toward him on the part of the trial judge, he alleged (and substantiated) judical acquiescence, if not active participation, in obstruction of justice. The facts amassed in support of the petition, showing clear judicial knowledge of the perjury and suppression of evidence, when combined with the judge's duty, independent of the prosecutor's duty, to correct such miscarriages of justice during trial, would surely be sufficient to implicate the trial judge as a member of a criminal conspiracy. Moreover, the judge's personal knowledge of disputed facts, as well as his status as a material witness, did not arise merely in the course of presiding over petitioner's prosecution. As the evidence clearly showed, there were numerous communications between the witness and the judge and between the prosecutor and the judge, in the course of the proceedings in which petitioner was neither present or a party. It was there that much of the knowledge was acquired. Even if all those communications were proper and

legitimate, and petitioner does not claim otherwise on the present record, they were unusual, and the judge's knowledge of the disputed facts was not acquired in the course of judicial proceedings involving this petitioner. If these do not constitute an "extrajudicial source' of bias, interest or knowledge, then neither would an offer or even acceptance of a bribe.

This Court has repeatedly held that for a judge who has "the slightest pecuniary interest" in the outcome to preside is a violation of the Due Process Clause. *Tumey v. Ohio,* 273 U.S. 510 (1927). Surely that term cannot sensibly be limited to an interest in the fine, or in the corporate stock of a litigant. An interest of a United States District Judge in his bar membership and his judicial post is surely a pecuniary one (or, in any event, for more disqualifying). This Court has also repeatedly held that when a judge is vilified by an accused, and serious allegations are made, "No one so cruely slandered is likely to maintain that calm detachment necessary for fair adjudication." *Mayberry v. Pennsylvania,* 400 U.S. 455, 465 (1971). A judge who becomes embroiled in controversary with the accused over the latter's allegations "cannot be, in the very nature of things, wholly disinterested [in the outcome]" *In re Murchison,* 349 U.S. 133, 136 (1955). See also, *Johnson v. Mississippi,* 403 U.S. 212 (1971); *Offut v. United States,* 348 U.S. 11 (1954). Manifestly, there is nothing in this Court's construction of the Due Process Clause — or in 28 U.S.C. §455— that makes disqualification turn on the source of the bias or interest.

To hold that Judge Pollack could lawfully preside in the determination of the truth or legal sufficiency of petitioner's claims in an assault on the most fundamental notions of adjudication; it makes a cruel joke of the Great Writ.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

STEVEN DUKE
Attorney for petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of May one thousand nine hundred and eigthy-one.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE JAMES L. OAKES,
Circuit Judges
HONORABLE HENRY F. WERKER,
District Judge, sitting by designation

VINCENT PACELLI, JR.,
Defendant-Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

81-2056

Appeal from the United States District Court of the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and it hereby are affirmed.

1. Appellant did not allege a bias by the trial judge arising from an extra-judicial source. *See In re International Business Machines Corp.*, 618 F. 2d 923, 928-29 (2d. Cir. 1980). Accordingly, the motion to disqualify the judge was properly denied. *See generally King v. United States*, 576 F. 2d 432, 437 (2d Cir.), *cert. denied*, 439 U.S. 850 (1978).

2. The allegedly perjured testimony at trial concerned only codefendant Papadakos; it was not part of the Government's case against appellant. *See Ostrer v. United States*, 577 F. 2d 782, 786 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). Accordingly, appellant's sentence may be vacated on the ground the Government used perjured testimony only if exposure of the perjury would create a reasonable doubt that would not otherwise exist. *See United States v. Menghi*, 641 F. 2d 72 (2d Cir. 1981). *See generally United States v. Agurs*, 427 *U.S.* 97, 112-13 (1976).

3. In light of the extensive impeachment of Cancio at appellant's 1972 trial, exposure of Cancio's alleged perjury would not have created a reasonable doubt as to appellant's guilt. *See United States v. Pacelli*, 470 F. 2d 67, 70 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973). Accordingly, appellant's motion to vacate sentence on this ground was properly denied. *See United States v. Menghi, supra.*

4. Appellant made only a general request for exculpatory material under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Accordingly, appellant's sentence may be vacated on the ground the Government suppressed exculpatory

material only if production of the information would create a reasonable doubt that would not otherwise exist. *United States* v. *Agurs, supra,* 427 U.S. at 112-13.

5. In light of Agent's Lepore's extensive testimony, the allegedly suppressed information would not have created a reasonable doubt as to appellant's guilt. *See United States* v. *Provenzano,* 615 F. 2d 37 (2d Cir.), *cert. denied,* 446 *U.S.* 953 (1980). Accordingly, his motion to vacate sentence on this ground was properly denied. *See United States* v. *Brown,* 582 F. 2d 197 (2d Cir.), *cert. denied,* 439 U.S. 915 (1978).

6. Moreover, appellant's delay in bringing his motion to vacate sentience is both unexplained and prejudicial to the Government. *See Honeycutt* v. *Ward,* 612 F. 2d 36, 41 (2d Cir. 1979), *cert. denied,* 446 U.S. 985 (1980). Accordingly, Judge Pollack properly took into account the lapse of time in denying the motion. *See Brach* v. *United States,* 542 F. 2d 4 (2d Cir. 1976).

7. We have examined appellant's other contentions on appeal, and find them to be without merit.

IRVING R. KAUFMAN

JAMES L. OAKES, *Circuit Judges*

HENRY F. WERKER, *District Judge*

Opposition

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No. 81-658

In the Supreme Court of the United States

OCTOBER TERM, 1981

VINCENT PACELLI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court properly denied a motion to vacate that alleged both knowing use of perjured testimony to obtain a conviction and suppression of material specifically requested under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

2. Whether the district court properly denied a motion for recusal alleging prejudice and bias toward petitioner.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1981. A petition for a writ of certiorari was filed as of August 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial, petitioner was convicted of conspiring to distribute heroin and cocaine, in violation of 21 U.S.C. 846 (Count 1). He was also convicted on one count of possession of heroin with

intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 3), one count of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A) (Count 4), and one count of using communications facilities to distribute heroin, in violation of 21 U.S.C. 843(b) and 841 (Count 5). He was acquitted on one count of possession of cocaine with intent to distribute it (Count 2).[1] He was sentenced to consecutive prison terms of five, ten, and five years on Counts 1, 3 and 4, respectively, and to a four-year term of imprisonment on Count 5 to run concurrently with the ten-year term imposed on Count 3. In addition, petitioner was given a committed fine of $10,000. His conviction was affirmed by the court of appeals, and this Court denied his petition for a writ of certiorari. *United States* v. *Pacelli*, 470 F.2d 67 (2d Cir. 1972), cert. denied, 410 U.S. 983 (1973). Eight years later, petitioner filed this motion under 28 U.S.C. 2255 to vacate his conviction. The district court denied the motion (Pet. App. 1b-34b), and the court of appeals affirmed (Pet. App. 1a-3a).

2. Petitioner's original trial began on February 8, 1972. His co-defendants were Demetrios Papadakos and Beverly Jalaba, his wife. The evidence overwhelmingly established petitioner's membership in a large-scale narcotics conspiracy, his participation in the distribution of one-half kilogram of heroin on

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[1] Petitioner was indicted with Beverly Jalaba (his wife), Demetrios Papadakos, and Elisa Possas. Possas pled guilty to four counts prior to trial and testified for the government. Papadakos was convicted on the conspiracy count and acquitted on one count of possession with intent to distribute. Jalaba's motion for a judgment of acquittal was granted at the close of the government's case.

May 20, 1971, and his possession of a quantity of pure cocaine with intent to distribute it. A somewhat lengthy exposition of the evidence and testimony presented at petitioner's trial, as well as subsequent events involving witness Lorenzo Cancio's testimony, is unfortunately necessary to place petitioner's present claims in proper perspective.

On May 3, 1971, Agent John Lepore of the Bureau of Narcotics and Dangerous Drugs (BNDD) (the predecessor of the Drug Enforcement Administration) went to the apartment of Joel West, an informant, and received two packages of cocaine that West said came from Elisa Possas (Tr. 16-19, 84-85, 256-257; GX 1C, 2A).[2] Two days later, on May 5, 1971, Agent Lepore returned to West's apartment and was introduced to Possas. Although he criticized the quality of the cocaine he had received from West, Lepore paid Possas $2,350 for it. Possas said that she had some better cocaine available, and that if Lepore was willing to wait she could bring him some "dynamite" cocaine (Tr. 20-22). Possas then left the apartment; she returned with almost one-half kilogram of the "dynamite" cocaine, which she said she had obtained from "Lorenzo," identified by other evidence as government witness Lorenzo Cancio (Tr. 168-174). She agreed to sell Lepore the cocaine for $8,000, to be paid the next day. Lepore then asked if Possas could get any heroin. She responded that her boyfriend, Papadakos, could furnish pure heroin for $28,000 a kilogram (Tr. 22-28, 70-71, 83-85; GX 4C). The next day, when Lepore paid Possas for the cocaine, Possas brought up the sale of heroin,

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[2] "Tr." refers to the transcript of petitioner's trial. "GX" refers to government exhibits at that trial. "Torres Tr." refers to the transcript of the trial in *United States* v. *Torres*, 519 F.2d 723 (2d Cir.), cert. denied, 423 U.S. 1019 (1975). "C.A. App." refers to the appendix in the court of appeals.

saying that "her man Jimmy Pappas has the best stuff in town" (Tr. 28-30). Papadakos was known as Jimmy Pappas.

Lepore and Possas next met on May 20, 1971. She showed the agent one-half kilogram of heroin, which Lepore agreed to purchase for $14,000. She told Lepore the heroin came from "Vinnie the Italian," identified by other evidence as petitioner.[3] According to Possas, Papadakos and "Vinnie" were partners in a national heroin distribution ring, and although the one-half kilogram of heroin had been intended for a customer in Chicago, "Vinnie" had agreed to sell it to Lepore. She elaborated that the "dynamite" cocaine sold to Lepore on May 5 had come from "Lorenzo," but that the cocaine sold on May 3 had come from "Vinnie," who normally supplied Papadakos only with heroin but who was trying to break into the cocaine business (Tr. 30-34).

Possas then called "Vinnie" at a telephone number listed to petitioner's fiancee, Jalaba. She said into the telephone "Hello, Vinnie, this is Lisa. My man will take the half," and "Okay, I will see you later," and hung up (Tr. 33, 523). Lepore then left with the heroin, after agreeing to pay Possas that night at dinner (Tr. 33-35).

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[3] Although she did not know "Vinnie's" last name, Possas said that she was invited to "Vinnie's" wedding at St. Patrick's Cathedral on June 6, 1971, to a woman named Beverly. She told Lepore that if he called her that afternoon she would tell him "Vinnie's" last name from the wedding invitation at her apartment. Later in the day, Lepore did call Possas and was told that "Vinnie the Italian's" full name was Vincent Pacelli, Jr. (Tr. 35). After Possas' arrest, an invitation to the wedding of Vincent Pacelli, Jr. and Beverly Jalaba at St. Patrick's Cathedral on June 6, 1971, was found in her apartment (Tr. 43-46; GX 6).

That evening, Lepore complained about the quality of the heroin and asked to see petitioner to register his complaint personally. When Possas told him that petitioner would not see any strangers, Lepore signalled surveillance agents, who closed in and arrested Possas (Tr. 36). Possas was taken to BNDD headquarters. After being advised of her rights, she again told the agents that petitioner had given her the heroin. Possas' statement was reduced to writing and signed by her after she made several corrections to it (Tr. 357-361). Possas also agreed to cooperate with the government, made several attempts to reach petitioner by telephone, and actually did speak to Jalaba (Tr. 207, 364).

The next day, May 21, 1971, BNDD agents went to Jalaba's apartment to arrest petitioner. When they announced their purpose, a male voice refused to open the door. Thereafter, the agents heard a window opening, Venetian blinds rattling, and a toilet flushing (Tr. 430-433, 488). At about this time, surveillance agents outside the building saw a white bag thrown out of Jalaba's window. The bag was retrieved and found to contain approximately 12 grams of 94% pure cocaine (Tr. 418-422, 435-436; GX 12G, 12H, 12M, 12P). Meanwhile, agents finally entered the apartment. Only petitioner and Jalaba were present, and the agents arrested them both. Petitioner was shown the bag of cocaine, and he admitted it was his; he also offered to bribe the agents (Tr. 440, 477). The agents returned later with a search warrant and recovered from the apartment a massive quantity of boric acid, which is used as a diluent for cocaine (Tr. 448, 450, 524-528).

3. At trial, Possas was called as a government witness and gave testimony diametrically opposed to

her pre- and post-arrest statement (Pet. App. 34b).[4] She claimed that she did not know petitioner, and she would not identify him in court (Tr. 243-244, 276). She testified that she got all of the drugs she sold to Agent Lepore from Cancio, and not from Papadakos and petitioner (Tr. 255, 258, 260, 277, 281, 288, 311). She denied making the statements attributed to her by the agents, both before and after her arrest. Indeed, she initially denied talking to the agents at all after her arrest, although she later recanted this testimony (Tr. 254, 263-264, 273-276, 318-319). She claimed that when Agent Lepore observed her call petitioner, she had really only dialed her own home and pretended to be talking (Tr. 274, 307-308).[5] She claimed that her "cooperation" was

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[4] This was not the only example of skittish witness behavior. Joel West, the informant, refused to testify at all and bolted from the stand (Tr. 110-112). Charles Sauve, the doorman in Possas' building, claimed he was unable to identify petitioner in court, although he had previously picked out petitioner's picture from a photo spread (Tr. 112-165). Sauve, who had a "not pleasant" confrontation with Papadakos after the latter's arrest, appeared "nervous and upset" on the stand (Tr. 125, 148-149). Such behavior was not wholly inexplicable. Patsy Parks, a friend of petitioner, disappeared on the eve of trial shortly after the government attempted to serve her with a subpoena; she was last seen alive looking for petitioner. Her brutally stabbed and burned body was discovered during the trial (Tr. 460-465). Petitioner was later convicted of this murder. See *United States* v. *Pacelli*, 521 F.2d 135 (2d Cir. 1975), cert. denied, 424 U.S. 911 (1976).

[5] Under the circumstances of the telephone call, this testimony was particularly unlikely. At the time Possas called petitioner she was unaware that Lepore was a federal agent. Possas also pled guility to Count 5 of the indictment, which alleged that her telephone call to petitioner was in furtherance

coerced by the agents' threat to rape her (Tr. 272) and that she signed the written statement because she was told it was deportation papers, although she admitted she was able to read English and had made corrections in the statement (Tr. 264, 314, 320-324). She claimed that when arrested she was tired, frightened, high on drugs, and angry at Papadakos (Tr. 277, 314-316, 332-341, 344-346). Although Possas was reluctant, unresponsive, and hostile on direct examination by the government, she was notably more pliant on cross-examination; indeed, the trial judge noted that she appeared to be getting signals from Papadakos (Tr. 348-349). After this testimony, the district court permitted the introduction of Possas' post-arrest statement.[6]

4. Lorenzo Cancio's brief testimony at petitioner's trial had nothing to do with petitioner. His testimony had one purpose only: to establish Papadakos' membership in the heroin and cocaine conspiracy. Agent Lepore had never met Papadakos, and the informant, Joel West, who might have dealt with Papadakos, refused to testify. There was thus no nonhearsay

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of the conspiracy to distribute narcotics. It is unlikely that counsel would have let Possas enter such a plea if the facts were as she claimed on the witness stand.

[6] On appeal from petitioner's conviction, the court of appeals held that Possas' statement could properly have been admitted only with an instruction limiting its use to the issue of credibility. *United States* v. *Pacelli*, *supra*, 470 F.2d at 70. (This decision preceded the adoption of Federal Rule of Evidence 801(d).) The court of appeals nevertheless held that the error was harmless, not for the reason petitioner states (Pet. 5), but because the independent evidence of petitioner's guilt was found to be overwhelming. 470 F.2d at 70.

testimony linking Papadakos to the conspiracy.[7] Cancio was therefore called to testify about various sales of cocaine to Papadakos and Possas for the sole purpose of proving that Papadakos and Possas were co-conspirators, thus making Possas' statements to Agent Lepore admissible against Papadakos. See *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970).

On direct examination, Cancio admitted that he had been convicted of robbery in 1962 and of unlawful possession of a firearm in 1967. He also testified that he had pled guilty to and was awaiting sentence on three separate federal narcotics indictments, including one charging him and Possas with distributing the one-half kilogram of cocaine that Possas sold to Agent Lepore on May 5, 1971 (Tr. 166-167). Edmund Rosner, petitioner's attorney, was fully aware of these charges because he had initially represented Cancio on them (C.A. App. 222, 339, 342). Cancio then testified that during 1971 he sold cocaine to Papadakos on four separate occasions, including one-half kilogram that he sold to Papadakos and Possas on May 5, 1971, at Possas' apartment (Tr. 167-168). Cancio described this transaction—which involved the one-half kilogram of "dynamite" cocaine that Possas resold to agent Lepore—in some

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[7] By contrast, there was substantial nonhearsay evidence linking petitioner to the conspiracy, including the cocaine thrown out of Beverly Jalaba's window at the time of petitioner's arrest and petitioner's admission that the cocaine was his; petitioner's attempt to bribe the arresting agent; the large quantity of boric acid found in the apartment; and, most critically, Possas' telephone call to "Vinnie" at Jalaba's telephone number. See, *e.g.*, *United States* v. *Stanchich*, 550 F.2d 1294, 1297-1298 n.1 (2d Cir. 1977); *United States* v. *Ziegler*, 583 F.2d 77, 81 n.7 (2d Cir. 1978).

detail. Cancio's entire direct examination occupies only 12 pages of transcript, including several lengthy colloquys among counsel; at no time did he mention or ever remotely implicate petitioner.

Recognizing that Cancio's testimony had not affected his client,[8] Rosner—who as lead counsel had the first opportunity to cross-examine—waived cross-examination of Cancio on behalf of petitioner, as did Jalaba's attorney, Rosner's wife (Tr. 177). Papadakos' attorney, who shared office space with Rosner, then undertook a searching cross-examination of Cancio. He explored Cancio's criminal record, eliciting that Cancio's robbery conviction involved the use of a gun and that Cancio had received substantial jail terms as a result of his earlier convictions (Tr. 178-182). After a lengthy inquiry into Cancio's use of cocaine (Tr. 183-189), Papadakos' attorney attacked Cancio's narcotics dealings. Cancio testified that he had never sold drugs before the beginning of 1971, and that between January 1971 and his arrest in October 1971, he had sold approximately five kilograms of cocaine and nothing else (Tr. 183, 192-196). Papadakos' attorney then brought out that Cancio had been arrested by federal agents twice in 1971. Finally, Papadakos' attorney brought out Cancio's motive for testifying. Cancio testified that he had agreed to cooperate after his second 1971 arrest and had been promised nothing except that the sentencing judge would be informed of his co-

[8] The limited purpose for which the government offered Cancio's testimony is underscored by the fact that Cancio was asked in court to identify only Papadakos (Tr. 167) and that the prosecutor repeatedly emphasized Papadakos' presence during the various transactions Cancio described (Tr. 171-172, 173, 173-174).

operation (Tr. 198-200). Cancio also said that he decided to cooperate "because I hope consideration" (Tr. 200-201). After stating that he had not lied to the jury in petitioner's trial, Cancio was asked about his testimony in another trial involving Maria DeCapo, his girlfriend. Cancio denied having lied at DeCapo's trial, although he admitted testifying on her behalf that he had put narcotics in her pocketbook without her knowledge (Tr. 201-203). When Judge Pollack sentenced Cancio to concurrent ten-year prison terms after petitioner's trial, he stated his belief that Cancio had perjured himself at DeCapo's trial to protect DeCapo (C.A. App. 76).

5. After Cancio's first arrest in 1971, he claimed he was willing to cooperate with federal agents in an investigation unrelated to petitioner's case involving Miguel Aspilche, an Argentinian drug dealer. According to BNDD reports (C.A. App. 158-651, 168-181), Cancio was first arrested in 1971 after buying approximately five kilograms of cocaine from Aspilche on May 18, 1981. Over the summer Cancio purportedly attempted to make contact with Aspilche for BNDD agents. Unknown to the agents, however, Cancio actually did buy a large quantity of cocaine and heroin from Aspilche in August 1971, which he then sold. Cancio, along with his girlfriend Maria DeCapo, was arrested a second time for additional drug sales in October 1971. He once again agreed to cooperate, and on October 7, 1971, he testified in the grand jury against Aspilche and others (C.A. App. 158-651). This led to the return of the Aspilche indictment the next day, charging Aspilche, Cancio, and three others with conspiracy to distribute "Schedule I and II narcotic drug controlled substances" (C.A. App. 44D-44E). The docket sheet shows that on the day the indictment was returned, Judge Lloyd

McMahon issued arrest warrants for all the defendants except Cancio and assigned the case to the calendar of Judge Pollack. Nothing further occurred in that matter until January 18, 1972, one month before petitioner's trial, when the case was transferred from the active docket of Judge Pollack to the district court's "Suspense" docket and marked "statistically closed." At that time, no defendant had been apprehended, served with the indictment, or arraigned (Pet. App. 8b; C.A. App. 44A).

More than two years after petitioner's trial, a superseding indictment was returned involving the Aspilche conspiracy (Docket No. 74 Cr. 472 (S.D. N.Y.)). In August 1974, Cancio testified at the trial of two defendants in that conspiracy, Torres and Rivera. See *United States* v. *Torres*, 519 F.2d 723 (2d Cir.), cert. denied, 423 U.S. 1019 (1975). Cancio testified pursuant to an agreement with the government under which he would not be prosecuted further unless he committed perjury, and the government agreed to furnish Cancio and his family protection and to advise the Parole Board of Cancio's cooperation (Torres Tr. 862-875). In his *Torres* testimony, Cancio described his involvement with Aspilche, including his sales of cocaine in May 1971 and his sales of cocaine and heroin in the summer and fall of 1971 after his initial arrest (Torres Tr. 892-901, 980-1002). Cancio also admitted that while he was supposedly cooperating with the government in the summer of 1971, he had harbored a federal fugitive (Torres Tr. 1109-1116). He admitted that he had been in the narcotics business prior to 1971, conceding that his contrary testimony at petitioner's trial had been perjurious (Torres Tr. 1043-1051, 1074-1075, 1149). Cancio also testified repeatedly that he had lied to the government after both of his 1971 arrests

by concealing the full scope of his narcotics dealings, and he stated that he did not cooperate fully with the government until shortly before the *Torres* trial (Torres Tr. 1061, 1085, 1089-1090, 1133, 1185, 1191-1197).

6. Over eight years after his conviction, petitioner filed a motion under 28 U.S.C. 2255 seeking to vacate his conviction. He raised four claims. First, he claimed that portions of Lorenzo Cancio's trial testimony were perjurious and known to be such by both the government and Judge Pollack. Second, he complained of the government's supposed failure to disclose Jencks Act and impeachment material relating to Cancio. Third, he claimed that the government and Judge Pollack affirmatively deceived him by leading him to believe that the only charges against Cancio related to cocaine, when there allegedly were outstanding heroin charges as well. Finally, petitioner claimed that the introduction of Possas' post-arrest statement was improper because the government was not surprised by her recantation and knew that portions of the statement were false. His motion was based primarily upon allegedly newly discovered evidence relating to Cancio, including the minutes of Cancio's guilty plea, Cancio's testimony in *United States* v. *Torres*, *supra*, various reports of BNDD agents relating to Cancio's *Torres* testimony, and the existence of the Aspilche indictment naming Cancio as a defendant (C.A. App. 44D). Petitioner also filed a motion to disqualify Judge Pollack from hearing the Section 2255 motion.

On July 22, 1980, Judge Pollack denied the disqualification motion (Pet. App. 1c-5c) because petitioner had alleged no bias arising out of circumstances other than the course of the trial proceedings. On November 25, 1980, Judge Pollack filed an opin-

ion denying the Section 2255 motion in all respects (Pet. App. 1b-33b). He held that Cancio's testimony was completely immaterial to petitioner's conviction and that no further impeachment of Cancio would have rendered it material (Pet. App. 19b). He similarly rejected (Pet. App. 24b-28b) the claim of prosecutorial suppression of material information. He stated that no evidence in the record or elsewhere supported the allegation of intentional nondisclosure of perjurious testimony or impeaching material. Furthermore, the district court observed that after the government had given notice in advance of trial of its intent to call Cancio as a witness, the trial judge gave petitioner's counsel the opportunity to interview Cancio and had informed counsel that " 'the government is prepared to give you continuing access to such information as you require' " (Pet. App. 24b). The district court further found that "[t]he record reflects that no specific *Brady* or § 3500 requests concerning Cancio were thereafter made" (*ibid.*). The court of appeals affirmed the district court's decisions in all respects (Pet. App. 1a-3a).

ARGUMENT

1. Petitioner contends (Pet. 16-22) that measured under the appropriate test of *United States* v. *Agurs*, 427 U.S. 97 (1976), he is entitled to a new trial. He claims both that the prosecution knowingly relied on perjured testimony to secure his conviction and that the prosecution suppressed information responsive to his specific *Brady* request. He argues his conviction cannot stand under *Agurs* because there is a reasonable likelihood that the false testimony and prosecutorial suppression could have affected the judgment of the jury. 427 U.S. at 103-104. Petitioner's claim is wholly without merit.

Under *Agurs*, if a defendant shows either that his conviction rests upon perjured testimony that the prosecutor knew or should have known about or that the prosecutor did not produce information in his possession in response to a specific *Brady* request, then the conviction must be set aside if there is any reasonable likelihood that the false testimony or suppressed evidence could have affected the judgment of the jury. *United States* v. *Agurs*, *supra*, 427 U.S. at 103-104; *United States* v. *Menghi*, 641 F.2d 72, 74 (2d Cir. 1981), cert. denied, No. 80-6453 (May 4, 1981); *Ostrer* v. *United States*, 577 F.2d 782, 786 (2d Cir. 1978), cert. denied, 439 U.S. 1115(1979). However, in the absence of known perjury or a specific *Brady* request, a new trial must be granted only if the suppressed evidence, evaluated in the context of the entire record, creates a reasonable doubt that would not otherwise exist. *United States* v. *Agurs*, *supra*, 427 U.S. at 112-113; *United States* v. *Menghi*, *supra*, 641 F.2d at 75; *Ostrer* v. *United States*, *supra*, 577 F.2d at 786.

Petitioner does not dispute this statement of the *Agurs* test (Pet. 16, 18-19). Instead he argues that, despite the contrary findings of the courts below, his conviction did rest on perjured testimony and suppressed evidence. But, although Cancio perjured himself at petitioner's trial with regard to Cancio's own prior unlawful activities, what petitioner completely ignores or fails to acknowledge is that Cancio's testimony was irrelevant to petitioner's conviction.

Petitioner's arguments fail on two scores. Not only did the government not use Cancio's testimony to obtain petitioner's conviction, but it was unaware of Cancio's perjury. Cancio's testimony was not introduced against petitioner, nor was it critical or even

material to the case against petitioner.[9] Since his conviction was not obtained by Cancio's testimony, any perjury in that testimony cannot now form the basis of a new trial.[10] The government, furthermore, had no greater knowledge than did petitioner that Cancio was testifying untruthfully at petitioner's trial. The perjury was not revealed until two years later at the *Torres* trial. Under *Agurs*, the stricter test for materiality requires not only the govern-

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[9] Petitioner's trial counsel also believed Cancio's testimony had nothing to do with petitioner's involvement in the conspiracy, as demonstrated by his waiver of cross-examination. Papadakos' attorney, by contrast, cross-examined Cancio vigorously because Cancio's testimony was material to Papadakos' involvement in the conspiracy. Furthermore, petitioner's counsel argued in summation that the "only proof" against petitioner was "testimony of agents as to what Alice [sic] Possas is supposed to have said" (Tr. 590).

[10] The evidence against petitioner from other sources was substantial. Agent Lepore testified to what Possas told him: that petitioner was Papadakos' partner in a national drug distribution ring, that the cocaine Lepore bought through the informant, West, on May 3 was supplied by petitioner, and that the one-half kilogram of heroin she sold to Lepore on May 20 came from petitioner. He also testified to the telephone call Possas made to Jalaba's number in which she notified petitioner of her sale of the heroin to Lepore. Lepore also described petitioner's arrest. The BNDD agents' initial announcement of their purpose was greeted with a refusal to open the door. That refusal and the ensuing sounds—a window being opened and a toilet flushing—all suggested disposal of evidence. The observation by other agents of a bag of cocaine thrown from a window confirmed that suspicion. Petitioner admitted to the agents that the cocaine was his, and his attempt to bribe them evidenced a guilty mind. The large quantity of boric acid, a diluent for cocaine, uncovered in a later search, also supported petitioner's involvement in the possession and distribution of cocaine.

ment's reliance upon perjured testimony but knowing reliance. *Agurs* does not establish the proposition that any perjured testimony, no matter how insignificant or how irrelevant, forms the basis for a new trial. Only "a conviction *obtained by the knowing use* of perjured testimony" warrants a new trial (427 U.S. at 103; emphasis added).

Petitioner is similarly mistaken when he contends that the court of appeals improperly applied the less stringent *Agurs* test to evaluate his *Brady* claim. His assertions to the contrary notwithstanding,[11] both lower courts found that he made no specific request for material concerning Cancio under *Brady* v. *Maryland*, 373 U.S. 83 (1963). No specific *Brady* request having been made, the court of appeals properly

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[11] Petitioner's catalogue (Pet. 11) of allegedly specific *Brady* requests is inaccurate if not deceptive. Long before trial and before the government announced it would call Cancio as a witness, petitioner made general *Brady* requests (C.A. App. 321). See *United States* v. *Menghi*, *supra*, 641 F.2d at 74 n.1. Petitioner made no specific request for *Brady* materials with respect to Cancio or anyone else. Cancio's cross-examination by Papadakos' counsel revealed the three indictments against Cancio. Thinking these indictments might raise problems of multiple conspiracies or double jeopardy, Papadakos' counsel once again raised the question of *Brady* materials (C.A. App. 347-349). The trial judge requested the government to reconsider the *Brady* request in light of these claims, but it had no documents that were responsive to the request (C.A. App. 350).

The government obviously did not disclose the immunity agreement with Cancio because it was not agreed to until shortly before the *Torres* trial—two years after petitioner's trial. The so called "fourth indictment" (or Aspilche indictment) was a public matter and was known to counsel. Indeed, it formed the basis for a motion by Papadakos' attorney only a few days after trial (C.A. App. 214).

evaluated petitioner's appeal under the less stringent standard—whether the suppressed evidence, evaluated in the context of the entire record, would create a reasonable doubt that would not otherwise exist.

In light of the extensive testimony involving petitioner in the conspiracy and specific substantive offenses, the evidence the government allegedly suppressed—bearing only on the credibility of a witness who did not testify against petitioner—would not possibly have created a reasonable doubt as to petitioner's guilt. The court of appeals so held, and petitioner has pointed to nothing that requires this Court's attention.[12]

2. Petitioner argues (Pet. 22-24) that Judge Pollack was personally biased and prejudiced against him and should have recused himself under 28 U.S.C. 455. Petitioner's claim is legally insufficient, and he offers no authority for his argument that the test for legal sufficiency is inappropriate.

The court of appeals held (Pet. App. 2a) that petitioner had alleged no bias by the trial judge arising from an extrajudicial source and that the recusal motion was therefore properly denied. *In re International Business Machines Corp.*, 618 F.2d 923, 928-

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[12] Petitioner's claim that the decision of the court of appeals conflicts with *United States* v. *Iverson*, 637 F.2d 799 (D.C. Cir. 1980), and *United States* v. *Barham*, 595 F.2d 231 (5th Cir. 1979), cert. denied, No. 80-6087 (Mar. 23, 1981), stems from a misapprehension of the holding in those cases. In *Iverson* (637 F.2d at 802-803) and in *Barham* (595 F.2d at 241) the courts found the government knew that testimony was false yet used it to obtain a conviction. The court of appeals here neither made nor had any basis to make either of those findings.

929 (2d Cir. 1980).[13] Legal sufficiency of a claim under 28 U.S.C. 455 is tested first by determining whether the alleged bias and prejudice "stem[s] from an extrajudicial source [that] result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *In re International Business Machines Corp.*, *supra*, 618 F.2d at 927. Petitioner has alleged no such bias and prejudice. Indeed, he acknowledges (Pet. 23-24) that the trial judge's communications in this proceeding were all "proper and legitimate."[14] The dire consequences that petitioner for-

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[13] This case, like *IBM*, *supra*, commenced prior to December 5, 1974, the effective date of 28 U.S.C. 455. The new section has been construed *in pari materia* with Section 144, and although there are some procedural differences between the two sections, both utilize the same substantive test to make the disqualification determination. *International Business Machines Corp.*, *supra*, 618 F.2d at 928; *Davis* v. *Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1054 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

[14] The so-called "judicial knowledge of the perjury" (Pet. 9-10 & n.2, 23) rests upon a blatant distortion of the record. Judge Pollack's statement when he sentenced Cancio in 1972 that Cancio had perjured himself was unmistakeably directed at Cancio's testimony on behalf of his girlfriend, Maria DeCapo, in another proceeding (C.A. App. 76). The claim (Pet. 10-11, 23) that Judge Pollack permitted the suppression of evidence is equally unfounded. While Judge Pollack knew at the time of Cancio's plea, three months before petitioner's trial, of the Aspilche indictment, he knew nothing about the underlying facts, and there is certainly no evidence that he knew the contents of the grand jury testimony or whether it contradicted Cancio's testimony at petitioner's trial. Furthermore, Judge Pollack knew that the Aspilche indictment was pending only formally, since it had been transferred to the

sees (Pet. 22) because of the application of this test are not presented by this case and ought not be addressed by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

GLORIA C. PHARES
Attorney

DECEMBER 1981

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court's "Suspense" docket prior to petitioner's trial. Judge Pollack's characterization of Cancio at his sentencing as a "major supplier of narcotics" was fully supported by Cancio's testimony at petitioner's trial.

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Petitioner's Reply Brief

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No. 81-658

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

VINCENT PACELLI, JR.

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

STEVEN B. DUKE
Hastings College of Law
198 McAllister Street
San Francisco, CA 94102
(415) 557-0448

Counsel for Petitioner

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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PETITIONER'S REPLY BRIEF

The Government contends that it was not aware of Cancio's perjury and, in any event, did not rely upon it in obtaining petitioner's conviction. The Government also asserts that a district judge who is shown by substantial—if not conclusive—evidence to have participated in a criminal conspiracy to convict petitioner on perjured and fraudulent evidence may lawfully adjudicate his own innocence of such charges, without even holding a hearing. The first contention ignores the record; the second ignores the law.

1. The Government Knew of Cancio's Perjury

In repeatedly asserting that the Government "was unaware of Cancio's perjury" (p. 14), "had no greater knowledge than did petitioner that Cancio was testifying untruthfully" (p. 15), the Government substitutes assertion for contrary record facts. Cancio committed perjury about his prior narcotics activities, repeatedly and at length (2-410-424). The very prosecutor who called Cancio to the stand knew that Cancio was lying because that very same prosecutor had elicited directly contrary evidence from Cancio, before a grand jury, a few months before (1-165), had obtained an indictment of Cancio and others which itself gave the lie to Cancio's testimony (1-44D). The prosecutor, Mr. Walker, had also obviously reviewed the BNDD reports concerning Cancio, at least three of which were directly inconsistent with Cancio's testimony (1-168-178). Prior to putting Cancio on the stand, Mr. Walker had also cross-examined him in a previous trial, a few weeks before petitioner's trial (1-33). Walker knew that Cancio had sold large quantities of heroin and cocaine in the summer of 1971, and on many previous occasions, and that his contrary testimony at petitioner's trial, repeated again and again, was a pack of lies.

It is thus entirely unnecessary to invoke the principle of *Giglio v. United States,* 450 U.S. 150 (1972) and *Santo-Bello v. New York,* 404 U.S. 257 (1971), and to point out that several of the BNDD agents who testified in petitioner's case were also aware of the perjury. The evidence adduced by petitioner, *in support of a request for a hearing,* would surely be enough to convict Mr. Walker, beyond

reasonable doubt, of suborning perjury and obstructing justice. There was *no* contrary evidence adduced below.

The Government was also plainly aware of Cancio's perjurious denial of any pending charges other than the three disclosed to the defense, *i.e.*, the fourth charge involving heroin (Petition, p. 7-8), and to his equally perjurious denial of any promises for his testimony (Petition, p.7). There is not a sprig of evidence to support the Government's contrary claims.

2. The Government Knowingly Relied upon Cancio's Perjury to Convict Petitioner

Again, the Government repeatedly asserts, without record support, that Cancio's testimony "had nothing to do with petitioner" (p. 7); that "the government [did] not use Cancio's testimony to convict petitioner." (p. 14). Except for Cancio's testimony, however, the only direct evidence regarding petitioner's participation in the crimes charged was the testimony of Possas, who repeatedly denied that petitioner was involved, and repeatedly swore that her co-conspirator was Lorenzo Cancio! (Petition, p.19)

A simple perusal of the summations in the case shows that Cancio was the key to the Government's case against petitioner. The prosecutor, Mr. Walker, virtually said as much (Petition, p. 9). Defense counsel argued that Cancio was lying and Possas telling the truth, Cancio's claims about his very limited involvement in cocaine and total noninvolvement in heroin being incredible (2-513-14, 516-17,530-33). Knowing that the claims of the defense lawyers were true and that Cancio had lied, the prosecutor, Mr.

Walker, nonetheless told the jury ". . . She says here that Lorenzo Cancio was her only source of narcotics, . . . [but] Lorenzo Cancio testified that he dealt in cocaine and not in heroin. . . . [t]hat Lorenzo Cancio was her only source for narcotics is absurd . . . (2-546). ***The Government is relying on the testimony of Lorenzo Cancio . . ." (Tr. 631). All of this is simply ignored by the Government.

3. The Government Flagrantly Violated Its Obligations Under Brady v. Maryland

The Government does not deny that it had an obligation to disclose Cancio's pending fourth indictment, the BNDD reports which recorded his narcotics activities, his immunity deal with the Government. It contends, however, that since there was only a "general request" for these materials, their suppression does not require a new trial unless an appellate court has a reasonable doubt of petitioner's guilt (p. 16-17). Since these materials would have disclosed Cancio's perjury, however, and the Government plainly knew it, there was no need for *any* request; the Government has an obligation to correct the perjurious testimony of its witnesses (Petition, p. 16). Moreover, the requests here were as specific as they could possibly have been. Since the defense did not know that Cancio would be a prosecution witness prior to the eve of trial, it could hardly have been expected to *name* him in its pretrial discovery requests. When, however, it was disclosed that Cancio would be a witness, the discovery requests were pressed with specific reference to Cancio (Petition, p. 11-12). Moreover, the prosecutor, Mr. Walker, had expressly agreed, prior to trial, to produce the criminal records of,

outstanding indictments of and statements of consideration promised or immunity granted to *any of its witnesses* (1-321,326). He had *pretended* to comply with reference to Cancio (2-332,360). This was a patent fraud.

4. The Trial Judge Was Disqualified to Sit on the Petition

The Government's position on petitioner's disqualification claim is that no matter how corrupt and criminal a judge's activities with respect to a criminal conviction may have been, that very same judge is free to sit on and to disallow any efforts to establish the corruption and criminality, provided it had no "extrajudicial source." This is nonsense. It ignores the plain language of the governing statute (Petition, p. 1-2), a quarter of a century of this Court's decisions (*Id.* at 24), and common sense. As petitioner noted (*Id.* at 23), a judge could take a bribe to convict an accused and, under the Government's view of the law, be qualified to sit on a petition which challenges his taking of the bribe. There, as here, the judge could simply, without even holding a hearing, find that he was free of guilt or, alternatively, that it didn't make any difference because he believes the accused was guilty anyway. If that is to be the law of this Nation, this Court should be the one to declare it.

Respectfully submitted,

STEVEN B. DUKE
Counsel for Petitioner

January, 1982